

Liberty Mut. Ins. Co. v McCaughin Bros. Fence LLC
2024 NY Slip Op 35420(U)
April 8, 2024
Supreme Court, Albany County
Docket Number: Index No. 902705-23
Judge: Daniel C. Lynch
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

LIBERTY MUTUAL INSURANCE COMPANY
a/s/o CHRISTOPHER MARSH and ANN MARSH,

Plaintiff,

-against-

DECISION AND ORDER

Index No.: 902705-23

RJI No.:

MCCAUGHIN BROTHERS FENCE LLC,

Defendant.

APPEARANCES: Jami Amarsinghe, Esq.
Carman, Callahan & Ingham, LLP
Attorneys for Plaintiff
266 Main Street
Farmingdale, New York 11735

LYNCH, J.:

This litigation arises out of an incident in which defendant McCaughin Brothers Fence LLC, while installing a fence at the property of Christopher Marsh and Ann Marsh (hereinafter “the Marshes”), damaged a sewer line, causing significant damage to the Marsh property. Christopher Marsh thereafter submitted a claim with his homeowner’s insurance company, plaintiff Liberty Mutual Insurance Company (hereinafter referred to as “Liberty”), who reimbursed him in the amount of \$12,481.66 for the damage. Liberty thereafter commenced a subrogation action against defendant, seeking to recover the amount paid, asserting claims for negligence and breach of contract for defendant’s improper installation of the fence. Defendant failed to answer, and Liberty now moves for default judgment. Defendant did not respond to Liberty’s motion.

“On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the

amount due” (CPLR 3215 (f); *see Dayco Mech. Servs., Inc. v Toscani*, 94 AD3d 1214, 1214 [3d Dept 2012]). In a subrogation action, “the rights of an insurer against a third party as equitable subrogee . . . accrue upon payment of the loss and are based upon the principle that in equity an insurer, which has been compelled under its policy to pay a loss, ought in fairness to be reimbursed by the party which caused the loss. The rights of an insurer as equitable subrogee against a third party are derivative and limited to such rights as the insured would have had against such third party for its default or wrongdoing” (*Federal Ins. Co. v Arthur Andersen & Co.*, 75 NY2d 366, 372 [1990]; *see Century Prop. & Cas. Inc. Corp. v McManus & Richter*, ___ AD3d ___, 2024 NY Slip Op 00799, *64 [1st Dept 2024]).

Liberty’s Negligence Claim

Liberty’s first claim is that defendant negligently installed the fence on the Marsh property, causing the water damage to the property, requiring plaintiff to pay the Marshes \$11,981.66, plus their \$500 deductible, under their insurance contract. “In order to prevail on a negligence claim, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom” (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016] [internal quotation marks and citation omitted]; *accord Buckley v 18 E. Main St., LLC*, 199 AD3d 1283, 1284 [3d Dept 2021]).

According to the affidavit of Christopher Marsh, submitted in support of Liberty’s motion, defendant damaged a sewer line, which caused significant water and other damage to the Marsh property. As a result, he made a claim with Liberty, who reimbursed him \$12,481.66 (PEX C: 1-2). Andrew Burdette, an appraiser, reviewed the estimate of the damages to the Marsh property, and determined that the amount of \$12,481.66 was a reasonable and accurate estimate of the cost of the damage suffered by the Marsh property as a result of the broken sewer line

(PEX B: 1-2). Records from the restoration and remodeling contractor show that Liberty paid for extensive repair work on the Marsh property, and reimbursed the Marshes for large amounts of lost property; the records also note that defendant punctured the sewage line (PEX B: 3-128).

The Court holds that defendant was negligent in installing the fence post, as defendant had a duty to the Marshes not to damage their sewer line while installing the fence, and the evidence shows that the damage to the Marshes' basement was caused by defendant damaging the sewer line (*see State Farm Fire & Cas. Co. v Real Wood Fabricating, LLC*, 188 AD3d 1529, 1530-1531 [3d Dept 2020]). Therefore, as plaintiff was required to reimburse the Marshes for the cost of repairing this damage, plaintiff is entitled to recover the \$12,481.66 expended from defendant (*see Federal Ins. Co. v Arthur Andersen & Co.*, 75 NY2d at 372; *Erie Ins. Co. v Pronti*, 52 AD3d 1016, 1017 [3d Dept 2008], *lv denied* 11 NY3d 711 [2008]).

Liberty's Breach of Contract Claim

Liberty's second claim is that defendant breached its contract with Marshes by improperly installing the fence in an unworkmanlike manner, requiring plaintiff to pay the Marshes \$11,981.66, plus their \$500 deductible, under their insurance contract. "[T]o establish a cause of action for breach of contract, a party must establish the existence of a contract, the party's own performance under the contract, the other party's breach of its contractual obligations, and damages resulting from the breach" (*EDW Drywall Constr., LLC v U.W. Marx, Inc.*, 186 AD3d 1720, 1722 [3d Dept 2020] [internal quotation marks and citation omitted]; *accord Radiation Oncology Servs. of Cent. N.Y., P.C. v Our Lady of Lourdes Mem. Hosp., Inc.*, 221 AD3d 1324, 1326 [3d Dept 2023]). In its contract with the Marshes, defendant warranted "that all work under [their] agreement would be performed in a good and workmanlike manner, shall be of good quality, free from faults and defects" (PEX C: 6). The Court holds that

defendant breached its contract with the Marshes, as it clearly did not install the fence in a good and workmanlike manner, which would entitle Liberty recover the amount it paid to the Marshes from defendant. However, because “[d]ouble recovery is not permitted for a single injury, even if a [plaintiff] can prove separate causes of action that result in the same injury,” and Liberty has already proven its entitlement to recovery for the money paid to the Marshes under its negligence theory, defendant’s liability to Liberty under a breach of contract theory is academic (*Hauser v Fort Hudson Nursing Ctr., Inc.*, 202 AD3d 45, 53 [3d Dept 2021]).

As set forth above, Liberty has demonstrated its entitlement to default judgment by submitting proof of service on defendant, the facts supporting defendant’s liability to it under both negligence and breach of contract theories, and defendant has defaulted (*see* CPLR 3215 (f); *Dayco Mech. Servs., Inc. v Toscani*, 94 AD3d 1214, 1214 [3d Dept 2012]).

Any remaining arguments not specifically addressed herein have been considered and found to be lacking in merit or need not be reached in light of this determination.

Accordingly, it is hereby

ORDERED, that Liberty’s motion for default judgment is granted; and it is further

ORDERED, that Liberty is granted judgment against defendant in the amount of \$12,481.66 plus costs and interest from November 20, 2022.

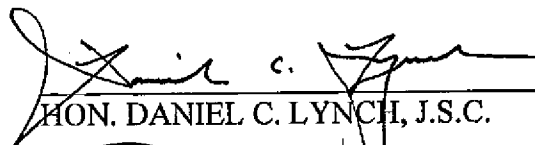
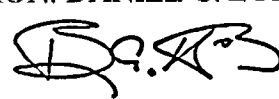
This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being uploaded to the NYSCEF system for filing and entry by the Columbia County Clerk. The signing of this Decision and Order and uploading to the NYSCEF system shall not constitute filing, entry, service, or notice of entry under CPLR 2220 and § 202.5-b(h)(2) of the Uniform Rules for the New York State Trial Courts. Counsel is not relieved from the applicable

provisions of those rules with respect to service and notice of entry of the Decision and Order.

SO ORDERED.

ENTER.

Dated: April 8, 2024
Albany, New York


HON. DANIEL C. LYNCH, J.S.C.
 04/09/2024

PAPERS CONSIDERED:

1. Notice of Motion for Default Judgment dated January 23, 2024, together with the Affirmation in Support of Jami Amarsinghe, Esq. and Exhibits A, B and C.

To:

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